IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 603

CHARLES A. TABASKO, JR.,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

To The Supreme Court of Ohio

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The opinion of the Supreme Court of Ohio is reported at 22 Ohio State 2d 36, 257 NE 2d 744, 1970, and appears at App. A, p. 15 through 25, of Petitioner's Brief. The entry denying the motion for re-hearing appears in Petitioner's Brief in App. B, p. 26. The opinion of the Court of Appeals for the Sixth Appellate District, Wood County, Ohio, appears at App. C, p. 27 through 29 of Petitioner's Brief.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the erroneous admission of numerous articles of evidence seized in violation of the Fourth and Fourteenth Amendments of the United States Constitution may be held to constitute harmless error where (1) the introduction, identification, and explanation of the

illegally seized items consumed over 170 of the 274 transcript pages of testimony; (2) the State relied heavily upon the use of the illegally seized items in examining those witnesses who were not connected with the actual search of the dwelling involved; (3) the writings seized constituted the principal evidence offered by the State to establish that Petitioner controlled the dwelling which had been searched; (4) the question of who controlled the dwelling in which the items were seized was in substantial dispute; (5) the State relied heavily, in closing argument, upon the probative value of the items seized; and (6) the Supreme Court of Ohio, in holding that the evidence was overwhelmingly sufficient to convict, relied in large part upon consideration of the illegally seized evidence?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The constitutional provisions and statute involved are set forth in Petitioner's Brief at p. 3-4.

STATEMENT

On June 28, 1967, search warrants were issued by the Bowling Green, Ohio, Municipal Court for the search of a house leased by Petitioner in Bowling Green, Ohio. The purpose of the search warrant was to recover narcotics and implements used to administer narcotics.

The law enforcement officers entered the residence, arrested the occupants, advised them of their rights and conducted a systematic search of the residence. Petitioner was not present at the time of the search, but the following day when he returned to Bowling Green, Ohio, he was arrested and charged with a violation of Ohio Revised Code, Section 3719.09 prohibiting the possession of marijuana.

The evidence obtained during the search of the premises included a copy of the lease instrument for the residence, a rental account labeled the "Homestead Fund", tin foil packet of marijuana, cigarette butts containing marijuana, assorted types of pipes carrying marijuana,

bottles and jars containing marijuana, fertile marijuana seeds, ash-trays containing marijuana, and a list of things to be done by the other residents in the Petitioner's absence.

A preliminary hearing was held in the Bowling Green Municipal Court and probable cause was found and the Petitioner was bound over to the Wood County Grand Jury. In the April Term of 1967, the Wood County Grand Jury indicted the Petitioner for a violation of Ohio Revised Code, Section 3719.101, prohibiting the using of a dwelling house controlled by the Petitioner for the illegal keeping, dispensing or administering of narcoti- drugs.

Prior to trial in the Wood County Common Pleas Court, the defendant filed a motion for change of Venue, a motion to Suppress Evidence, and several motions for Bills of Particular. All of these motions were overruled, except the motion for Bills of Particular. No appeal was taken from the decision in regards to the motions that were overruled.

In the hearing on the motions that were filed by the defendant, no complaint was made by the defendant that the search warrant was invalid or that the property had been illegally seized. The trial court, in fact, was nover called on to pass on the specific claim that the search warrant was invalid and therefore that the evidence seized pursuant to the warrant should be suppressed and therefore inadmissable at trial.

The trial began on December 11, 1967. During the course of the trial all of the exhibits were admitted into evidence with consent of Petitioner's counsel except for the rental account, labeled the "Homestead Fund". (R 154). A verdict of guilty was returned after the close of the trial on December 13, 1967. A motion for a new trial was made by the defendant and after it was overruled and the defendant had been sentenced to the Mansfield Reformatory for a period of two to fifteen years.

Petitioner later filed a motion for leave to appeal in the Court of Appeals for the Sixth District. This motion was granted and briefs were submitted on the merits and oral arguments were heard. The Court of Appeals affirmed Petitioner's conviction by order entered on May 28, 1969.

Motion for leave to appeal was granted by the Ohio Supreme Court and after argument the Petitioner's conviction was affirmed. The petition for a Writ of Certiorari was then filed in this court.

ARGUMENT

I

THE DECISION BELOW IS NOT IN DIRECT CONFLICT WITH THE DOCTRINE OF HARMLESS CONSTITUTIONAL ERROR ESTABLISHED BY THIS COURT IN CHAPMAN V. CALIFORNIA AND IS THEREFORE CORRECT.

The concept that Federal Constitutional error required an automatic reversal of a criminal conviction was rejected by this court in the case of Chapman v. California, 386 U.S. 18 (1967). This case involved a trial where the prosecutor, over defense objections, made numerous comments on the defendant's failure to testify. Shortly after the trial was concluded and before the case was considered by the California Supreme Court, this court decided the case of Griffin v. California, 380 U.S. 609 (1965), which held such comments error.

The California Supreme Court in the Chapman case applied the California Harmless Error statute and held that the prosecutor's statements had not been of such prejudicial nature as to require reversal. The United States Supreme Court said in reversing the California Supreme Court at page 23,

> We do no more than adhere to the meaning of our Fahy case when we hold, as we do now, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. While appellate courts do not ordinarily have the original

> task of applying such a test, it is a familiar standard to all courts, and we believe its adoption will provide a more workable standard, although achieving the same result as that aimed at in our own Fahy case.

The Fahy case which is referred to in the previous quotation is the case of Fahy v. Connecticut, 375 U.S. 85 (1963), where the court was faced with a similar situation as that in Chapman, supra. In this case evidence was admitted into the trial over defendant's objections. The evidence was subsequently found to have been illegally seized in the decision of the Connecticut Supreme Court of Errors, but the error was determined to be harmless. The United States Supreme Court held that such error was not harmless and that such admission of evidence was prejudicial to the defendant and the case was reversed.

Petitioner, in the present case, is attempting to show that we have a situation that would require the application of the prihciples enunciated in the Chapman case regarding harmless error. However, the facts in this case do not fit the situations in the previously cited cases which would require this court to make a determination of whether harmless or prejudicial error was present.

At no time prior to or during the trial was the court requested by the Petitioner to pass on the validity of the search warrant. At no time during the trial did Petitioner object to the admission of the seized evidence on the grounds that they were seized as the result of an invalid search warrant. Judge Leach of the Ohio Supreme Court in concurring with the majority in affirming Petitioner's conviction, stated,

> Under this state of the record, there is no showing that the trial court was even requested to pass on the specific claim of invalidity of the search warrant as a basis for the exclusion of evidence. To the contrary, during trial such evidence was admitted by agreement. State v. Tabasko, 22 O.S. 2d 36 (1970) at page 46.

It is the general rule of Ohio that the incompetency of evidence may be waived by the failure to object thereto and no advantage can be taken on review of the admission of the improper testimony or evidence unless an objection to its admission is made in the trial court. 3 O. Jur. 2d 185.

In the case of State v. Carder, 9 O.S. 2d 1, 222 N.E. 2d 620, the court held that the failure of the defendant to question admissibility of fingerprints and photographs could not be raised on appeal when not questioned in the trial court.

At no point during the course of the proceedings relative to this case has there ever been any determination that the evidence admitted at trial had been improperly admitted or seized under an invalid search warrant. The Court of Appeals unanimously held that the search warrant was valid and noted the Petitioner's consent to all of the items seized relating to narcotics.

The Ohio Supreme Court never reached the question of whether the evidence had been properly admitted. The courts only statement concerning the allegedly illegally admitted evidence was the following at page 41,

> We are therefore of the opinion that even if those items were improperly admitted in evidence at the trial such admission did not operate to appellant's prejudice. State v. Tabasko, 22 O.S. 2d 36 (1970).

Therefore, the argument put forward by the Petitioner that this case comes within the confines of Chapman, supra, is invalid. No objection was raised to the admission of the evidence, the trial court was not requested to even consider the admissibility of most of the items seized or as to the validity of the search warrant, a waiver by petitioner was made as to the right to appeal such questions, and no court has made a determination that the search warrant was invalid or that the items of evidence were improperly admitted.

II

USE OF THE HARMLESS ERROR DOCTRINE TO CIRCUMVENT CONSTITUTIONAL ERROR, AS DEMONSTRATED BY THIS CASE AND SEVERAL OTHER DECISIONS SINCE CHAPMAN V. CALIFORNIA, DOES NOT CREATE THE GRAVE DANGER THAT FEDERAL CONSTITUTIONAL STANDARDS WILL BE SERIOUSLY SUBVERTED.

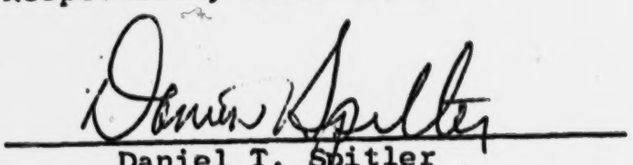
Petitioner argues that the Ohio Supreme Court has ignored constitutional error because there was other evidence sufficient to support a conviction in this case. However, there has never been any determination by any court that constitutional error was involved in this case. In fact, it is quite clear that Petitioner by his failure to object to the search warrant or the admission of the items in evidence has waived his right to have those questions considered.

Therefore, we submit that there has been no attempt to circumvent constitional error by the use of the harmless error doctrine because no constitutional error has been shown and determined.

CONCLUSION

For the foregoing reasons a writ of certiorari should not issue to review the judgment and opinion of the Supreme Court of Ohio.

Respectfully submitted,



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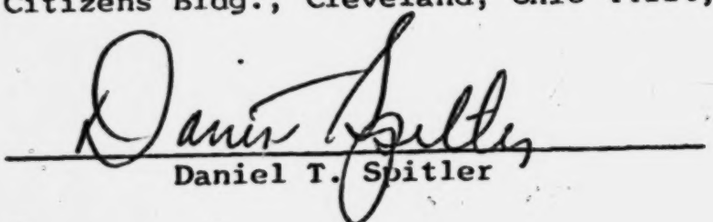
PROOF OF SERVICE

A copy of the foregoing Brief was mailed to Gerald A. Messerman, Counsel for Petitioner, 616 Citizens Bldg., Cleveland, Ohio 44114, this 8th day of December, 1970.



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